

Sheet Metal Workers Local No. 16 and J & F Industries, Inc. and Gaylord Industries, Inc. Case 36-CD-175

28 March 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed 26 August 1983 by J & F Industries, Inc., alleging that the Respondent, Sheet Metal Workers, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer, Gaylord Industries, Inc., to assign certain work to employees it represents rather than to the Employer's unrepresented employees. The hearing was held 18 October 1983 before Hearing Officer Richard V. Stratton.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

J & F Industries, Inc., an Oregon corporation, is engaged as a sheet metal fabricator at its facility in Portland, Oregon, where it annually provides services in excess of \$50,000 for employers outside the State of Oregon. The parties stipulate, and we find, that J & F Industries, Inc. is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Sheet Metal Workers is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Gaylord Industries, Inc. has been subcontracting the manufacture of its patented grease extraction systems (hoods) for restaurant kitchens to J & F Industries, Inc. since about 1971 or 1972. During the 4 years prior to the hearing, Gaylord had sent employees to J & F's facility to install Ansul or Kidde dry chemical fire suppression systems on Gaylord's hoods. Gaylord had a fire protection division and was a certified, licensed installer of these systems. For about 1-1/2 years prior to March 1983, however, J & F employees had been installing piping and nozzles for the Quencher, Gaylord's water spray

fire protection system. During this period, Gaylord did not have the approval of Underwriters Laboratories, Inc. for the Quencher.

In March 1983, Gaylord sent J & F's president a letter stating that it had now obtained complete Underwriters Laboratories' approval and had been issued a patent number for the Quencher. The letter further stated that, under national regulation, listed systems must be installed in accordance with the terms of their listing, that the product liability insurance Gaylord was carrying covered its certified company installers, and that these were the reasons for Gaylord's employees to do the piping work for the Quencher as they had been doing it for the Ansul and Kidde systems.

In approximately March 1983, Sheet Metal Workers demanded the piping work on the Quencher. At that time Joe Smith, J & F's president, met Milton Hill, Sheet Metal Workers' business manager. Smith explained to Hill the reason the work was being done by Gaylord employees, and Hill asked for a letter explaining J & F's position. The letter, dated 2 May 1983, listed reasons why J & F did not wish to install the piping for the Quencher and stated, "Our customer, Gaylord, has decided to do the work. . . . We have no control over their decision."

Late in May, Gaylord employees came to J & F's facility to perform the disputed work and J & F employees threatened to walk off the job unless the Gaylord people left. In August, Gaylord employees again came to J & F and J & F employees asked the plant superintendent if the people working were from Gaylord. They were told "yes." J & F employees then said that if J & F did not get the Gaylord people off the job, they would walk off. Subsequently, the J & F employees walked off. Later in August, Gaylord employees returned and the Sheet Metal Workers' shop steward told J & F employees that if they did not leave he would prefer charges against them.

B. Work in Dispute

The disputed work involves the installation of pipe for fire suppression systems in ventilation hoods.

C. Contentions of the Parties

J & F and Gaylord contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the adjustment of the dispute. J & F and Gaylord further contend that the work should be awarded to Gaylord's unrepresented employees based on Gaylord's preference and practice, economy and efficiency, and relative skills.

Sheet Metal Workers contends that the notice of hearing should be quashed because it was attempting to retrieve work previously performed by employees it represents and because there are not two competing groups of rival employees for the work in dispute. Sheet Metal Workers further contends that if the Board has jurisdiction over the dispute then the disputed work should be awarded to employees represented by Sheet Metal Workers based on its collective-bargaining agreement with J & F, industry practice, relative skills, economy and efficiency of operations, and J & F's past practice.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Initially, we reject Sheet Metal Workers' contention that it is attempting to retrieve work performed by employees it represents. While it is undisputed that employees represented by Sheet Metal Workers did piping on the Quencher system prior to March 1983, it is also undisputed that they have never done piping on Underwriters Laboratories approved systems. When Gaylord received Underwriters Laboratories' approval, it notified J & F that the piping would have to be installed "in accordance with the approved plans and the listing of a testing laboratory." Thus, the disputed work is not the same as the piping work done by employees represented by Sheet Metal Workers because the disputed work must be done in accordance with approved plans and the listings of the testing laboratory. Additionally, we note there is no evidence of any jobs lost because Gaylord's employees performed the disputed work. Further, we reject the Sheet Metal Workers' contention that there are not two competing groups of rival employees because Gaylord's employees are not represented and there is no evidence in the record that they sought assignment to the disputed work. It is well settled that the fact that employees are performing the disputed work is evidence that they claim it.¹ The record shows that Gaylord's employees performed the disputed work, and thus we conclude that there are competing claims to it.

It is undisputed that Sheet Metal Workers claimed the disputed work and that on one occasion employees represented by Sheet Metal Work-

ers threatened to walk off if Gaylord employees continued to do the disputed work. It is also undisputed that on two occasions employees represented by Sheet Metal Workers actually walked off because Gaylord's employees were performing the disputed work. Based on the forgoing, and on the record as a whole, we find that there is reasonable cause to believe that an object of the threatened work stoppage and of the work stoppages by employees represented by Sheet Metal Workers was to force Gaylord to assign the disputed work to employees represented by Sheet Metal Workers and that a violation of Section 8(b)(4)(D) has occurred. Additionally, no party contends and there is no evidence showing that there is an agreed-upon method for the voluntary adjustment of the instant dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

Sheet Metal Workers has not been certified by the Board as collective-bargaining representative for a unit of either J & F or Gaylord employees. Although Sheet Metal Workers has collective-bargaining agreements with J & F, it has none with the Employer, Gaylord. Thus, the factors of certification and of collective-bargaining agreements are not helpful to our determination.

2. Company preference and past practice

The record reveals that Gaylord and J & F prefer that the disputed work be assigned to Gaylord's employees. The record further reveals that Gaylord has consistently assigned the piping of approved systems, such as Ansul and Kidde, to its own employees, so the assignment of Quencher piping to Gaylord employees, once that system was approved, was consistent with Gaylord's past practice. We therefore find that the factor of past practice favors awarding the disputed work to Gay-

¹ *Operating Engineers Local 926 (Georgia World Congress Center)*, 254 NLRB 994, 996 (1981).

lord's employees. We further find that, although not entitled to controlling weight, the factor of company preference favors awarding the disputed work to Gaylord's employees.

3. Area and industry practice

Sheet Metal Workers' business manager testified that he visited a competitor of J & F and observed a union member installing fire protection equipment similar to the Quencher, but he did not indicate whether the system installed by the union member was approved by a testing laboratory nor did he testify concerning other companies in the industry. Gaylord's president testified that approved systems are installed by employees who have completed schooling in their installation but did not testify whether or not such employees are represented by Sheet Metal Workers. Thus the factors of area and industry practice are not helpful to our determination.

4. Relative skills

Although employees represented by Sheet Metal Workers and Gaylord's employees have done piping on the Quencher system, it is undisputed that only Gaylord's employees have completed Gaylord's training program on Quencher installation. We therefore find that the factor of relative skills favors awarding the disputed work to Gaylord's employees.

5. Economy and efficiency of operations

J & F's president testified that J & F did not have personnel to do followup inspections on Quencher installations and J & F's product liability insurance did not cover fire suppression systems. Gaylord's president testified that its product liability insurance rate was lower because the disputed work was being done under its certification pro-

gram and because Gaylord had a nationwide inspection organization. Thus insurance costs were less and J & F did not need to duplicate Gaylord's inspection system when Gaylord employees performed the disputed work. We therefore find that the factors of economy and efficiency of operation favor awarding the disputed work to Gaylord's employees.

Conclusions

After considering all the relevant factors, we conclude that Gaylord's unrepresented employees are entitled to perform the work in dispute. We reach this conclusion relying on company preference, past practice, relative skills, and economy and efficiency of operation. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. The unrepresented employees of Gaylord Industries, Inc. are entitled to perform the installation of pipe for fire suppression systems in ventilations hoods at the J & F Industries, Inc. facility in Portland, Oregon.

2. Sheet Metal Workers Local No. 16 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Gaylord Industries, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Sheet Metal Workers Local No. 16 shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.